

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF VETERANS AFFAIRS

Terry V. Davis,

Petitioner,

vs.

City of Perham,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDED DECISION**

The above-entitled matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on February 16-17, 2006, at the City Council Chambers, 125 Second Avenue Northeast, Perham, Minnesota. The OAH record closed on April 3, 2006, upon receipt of the City's post-hearing brief.

Patrick J. Kelly, Esq., and David Ramberg, Esq., Kelly & Fawcett, PA, 444 Cedar Street, Suite 2350, St. Paul, MN 55101, appeared for the Petitioner, Terry V. Davis.

Daniel R. Wachtler, Esq., Briggs and Morgan, 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, appeared for the Respondent, City of Perham.

**NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Clark Dyrud, Commissioner, Department of Veterans Affairs, 206C Veterans Service Building, 20 West 12<sup>th</sup> Street, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the

expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

### **STATEMENT OF ISSUE**

The issue in this case is whether the City's decision to eliminate a position in the Department of Public Works and to lay off the Petitioner was made in good faith for a legitimate purpose within the meaning of the Veterans Preference Act.

The Administrative Law Judge concludes the City demonstrated that its decision to eliminate the position and to lay off the Petitioner was made in good faith for a legitimate purpose.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. The Petitioner, Terry V. Davis, is a 39-year old man who is entitled to the protections of the Veterans Preference Act, and the City of Perham as a political subdivision of the state is subject to the Act. The Petitioner attended high school in Perham and upon graduation enlisted in the U.S. Marine Corps, in which he served from 1985-97. While in the service he was a light armored vehicle crewman, parachutist, and marksmanship instructor. After being honorably discharged, the Petitioner returned to the Perham area and worked for several years as a truck driver for various employers.<sup>[1]</sup>

2. The City has a year-round population of about 2,700. In the summer, the population of the school district and surrounding areas swells to approximately 20,000, because the area has many seasonal homes and resorts on nearby lakes.<sup>[2]</sup> The City provides municipal services (water, sewer, and gas) within the City limits, an area of about two and one-half square miles. It provides natural gas service to a much larger area, however; the gas system extends approximately 40 miles from north to south and is about ten miles wide, meaning the City provides gas service to an area of approximately 400 square miles.<sup>[3]</sup>

3. The City has 35 full-time employees and 15 part-time employees. The City's Department of Public Works, before August 2005, was composed of seven full-time employees (six employees plus a supervisor) and two part-time employees, with seasonal workers in the summer months. The Department is organized into four sections, with one or more employees assigned primarily to work in each section: water/wastewater, park maintenance, street maintenance,

and natural gas.<sup>[4]</sup> Each of these positions provided assistance to other areas in the Department on an as-needed basis.<sup>[5]</sup>

4. At all relevant times, Merle Meece has been the supervisor of the Department of Public Works. As of approximately May 2002, the other full-time employees were assigned as follows: Keith Huntley, water/wastewater; Larry Brasel, park maintenance; Gerald Schock, Keith McKinley, and Kenneth Ellingson, natural gas; and Tom Glander, street maintenance.<sup>[6]</sup> All of the full-time employees in the Department, except for Gerald Schock, are veterans.<sup>[7]</sup> The part-time employees were Dorvin Wendt and Brenda Anderson. The seasonal employees tended to be high school or college students who worked over their summer break.<sup>[8]</sup>

5. One reason why the gas section had three employees assigned to it was because, in addition to the year-round tasks associated with maintaining and operating the gas system, gas section employees were required to do the seasonally intensive work of locating and marking buried utility lines before homeowners could engage in digging or excavating associated with construction or remodeling work. Whereas the Public Works Department might receive seven to 15 requests per month to locate utilities in the winter, in the summer construction season (April through October) that number ranged from 200-250 requests per month. Within the City limits, gas section employees had to locate the water main, sewer main, and natural gas lines for each request; in rural areas, they located only the natural gas lines. Because the locate requests must be completed within 48 hours of receipt excluding weekends and holidays, that work was a priority, and gas section employees were frequently pulled from other scheduled tasks to help out whoever was assigned that week to locate utilities.<sup>[9]</sup> In addition, the gas section was obligated to perform annual surveys of the gas system as required by the U.S. Department of Transportation, Office of Pipeline Management. The Public Works Department had difficulty completing the surveys each year on a timely basis.<sup>[10]</sup>

6. In May 2002, Department of Public Works hired the Petitioner as a maintenance worker to provide support to other employees in the department. Within about one year he was assigned to work primarily in the water/wastewater section, when Keith McKinley resigned and Keith Huntley moved from water/wastewater to a gas technician position.<sup>[11]</sup> The Petitioner's responsibilities included operating the sewer-cleaning equipment; performing routine inspections of storm sewer lift stations; performing daily inspections of the wastewater system, including checking ponds, the irrigation system, and lift stations; performing routine maintenance and any necessary testing of the water and wastewater systems; operating and maintaining various kinds of equipment used in the work; plowing and snow removal; and providing assistance to other areas as needed.<sup>[12]</sup>

7. One of the Petitioner's responsibilities was to help read meters so the City could send out monthly bills for municipal services. Within the city limits,

two people from Public Works were assigned to read meters full-time for approximately one week each month, although their work could be interrupted periodically if other work required immediate attention. Generally, the meter-reading started on about the 20<sup>th</sup> of the month and was completed by the first or second day of the following month. In rural areas, residents read their own meters and self-reported the results for billing purposes. The City Council had directed the Department of Public Works to have employees read rural meters twice a year, in order to ensure more accurate billings. Typically, rural meters were read only once a year because Public Works employees had too much other work to do.<sup>[13]</sup>

8. In 2003, the legislature cut the amount of Local Government Aid (LGA) to cities, reducing by 25% the LGA received by the City. The Mayor and City Council began looking for ways to trim the budget wherever possible.<sup>[14]</sup> In 2003, one full-time employee of Public Works resigned and was not replaced (bringing staffing to the levels described in Finding No. 3 above).<sup>[15]</sup>

9. In the summer or fall of 2003, the regional manager of Otter Tail Power approached Robert Louiseau, the City Manager, about combining and subcontracting the meter reading for both the power company and municipal utilities. The regional manager indicated that the company was attempting to structure some agreement with the city of Fergus Falls to hire a contractor to read all the meters in an effort to save money for both the power company and the city.<sup>[16]</sup>

10. At about the same time, Merle Meece, supervisor of Public Works, attended a conference on damage prevention contracts and obtained information from vendors regarding subcontracting of utility locating work.<sup>[17]</sup>

11. The City Manager and Public Works supervisor became interested in the possibility of subcontracting the meter reading and utility locating work in order to improve the efficiency of the Department of Public Works and potentially save money. They discussed the possibility of subcontracting this work with the Public Works Committee of the City Council in late 2003.<sup>[18]</sup> Because Otter Tail Power wanted to get its meter-reading agreement in place with Fergus Falls before attempting to structure such an arrangement with Perham, the discussions were basically put on hold for several months.<sup>[19]</sup>

12. In early 2004 the City Council and City Manager became aware that some members of the Public Works Department were attempting to organize union representation through the Teamsters Public and Law Enforcement Employees' Union, Local 320.<sup>[20]</sup> The efforts to organize through the union caused some tension within the Department, as some employees felt strongly that unionizing would be beneficial, while others were strongly opposed to it.<sup>[21]</sup> The Petitioner was among the group of employees in favor of unionizing.<sup>[22]</sup> The City Manager was opposed to the union.<sup>[23]</sup>

13. To cut costs during 2004, the City reached an agreement with the City of New York Mills to share the police chief position between the two municipalities.<sup>[24]</sup>

14. In October 2004 the City received notice that the Teamsters Local 320 had become the certified bargaining representative for Public Works employees.<sup>[25]</sup> Keith Huntley and Gerald Schock were elected as union stewards.<sup>[26]</sup>

15. Toward the end of 2004, when working on budgeting issues, the City Council directed the Public Works Department to start putting together cost information so the Council could determine whether subcontracting meter reading and utility locating would save the City any money.<sup>[27]</sup> At this time, the Public Works Department was again behind in completing the required surveys of the gas system.<sup>[28]</sup>

16. Meece contacted several vendors and obtained information from them. A company called Great Plains Locating Service, Inc., sent him a brochure containing a cost model intended to help municipalities determine whether subcontracting for utility locating would be cost-effective.<sup>[29]</sup>

17. On December 23, 2004, the City advised the union that the City was seriously considering contracting with a private vendor for locating, meter reading, mowing, park maintenance, and other services, and if the City did subcontract for these services, it could affect the total number of hours worked by city employees being represented by the union. The City indicated it was prepared to discuss this issue in the first negotiation meeting set for January 7, 2005.<sup>[30]</sup> The union did not respond to the letter or raise the issue in negotiations.

18. Meece used the model from Great Plains Locating Service to put together a cost analysis comparing what the City could save by eliminating one full-time position with the cost of contracting with vendors to do locating, meter reading and meter work. He developed a loaded labor rate for locating, based on the assumption that one employee was assigned to perform locating work full-time for eight months of the year, and during four summer months a second employee did it half time. The loaded labor rate he calculated was between \$21.86 to \$25.18 per hour. For meter reading, he assumed the work took 50% of one full-time employee's time. The loaded labor rate he calculated for meter reading was \$19.33 to \$21.22 per hour. He also calculated the cost to the City for mowing, which was \$8.35 per hour.<sup>[31]</sup>

19. On March 1, 2005, the City again advised the union that it was taking proposals from private vendors to perform locating, meter reading, and park maintenance services and stated it was prepared to discuss these issues in the ongoing negotiations.<sup>[32]</sup> The union did not respond to the letter or raise the issue in negotiations.<sup>[33]</sup>

20. On March 29, 2005, Meece submitted a memorandum to the City Council summarizing his calculation of cost for locating, meter reading, and mowing. He also included information about quotes received from Great Plains Locating, T & G Meters, and two mowing services.<sup>[34]</sup>

21. The City Council Committee of the Whole considered the memorandum at its March 29, 2005 meeting. Its minutes provide:

Initial findings show the City may save a significant amount of money if these services were contracted out. It was noted if these services were to be contracted out, one full-time employee may be laid off. Discussion ensued regarding costs, reliability, regulatory compliance, availability and other factors to be considered. It was noted prior to the April Council Meeting, Council would receive more information regarding this matter.<sup>[35]</sup>

22. On April 5, 2005, Meece forwarded to the City Council a series of memoranda addressing cost comparisons for locating, meter reading, and mowing. With regard to locating, he assessed the City's cost of the full-time position by using the wages of the lowest paid gas technician, and he included 20 hours of overtime and benefits. He calculated transportation expense by amortizing the cost of a vehicle over seven years, and he included other miscellaneous expenses including cell phone cost and equipment that would be avoided by eliminating a full-time position. The total expense to the City of having an employee do the work was calculated as \$51,041.54. In comparison, the two vendors contacted provided bids of \$48,100 and \$36,000.<sup>[36]</sup> Based on this analysis, by eliminating a full-time position and subcontracting the work, the City could save between \$3,000 and \$15,000 per year, depending on which bid was selected.

23. With regard to meter reading, Meece calculated the City's cost to be about \$26,000, whereas the vendor bids were about \$13,000 and \$24,000. Because the cost to the city was less than the salary of a full-time position, Meece recommended that part-time wages could be reduced by subcontracting this work.<sup>[37]</sup>

24. With regard to lawn mowing, Meece calculated the City's cost to be \$13,551, whereas vendors had submitted bids of \$12,000 and \$21,000. Meece concluded that seasonal employee expenses could be reduced, but that would adversely impact completion of other projects in the Department. He recommended against contracting the mowing.<sup>[38]</sup>

25. On April 8, 2005, the City advised the union that the City Council would be considering the issue at its next meeting.<sup>[39]</sup>

26. On April 11, 2005, the City Council considered the memoranda submitted by Meece. Several Public Works employees and the union business



agent were present for the discussion of contracting services. The employees and union representative questioned whether the service would be as good as having an employee perform the work. The council tabled the issue until after the next contract negotiation meeting with the union.<sup>[40]</sup>

27. On April 14, 2005, City representatives met with union representatives to discuss the subcontracting issues. The union representatives asked questions about whether a bidding or request for proposal process would be used, asked questions about the quotes received from vendors, and discussed other cost-cutting measures. The union representatives suggested that the City should use temporary personnel for its office staff, instead of retaining employees for those positions. After this meeting, the union did not ask for any additional meetings or negotiation sessions concerning these issues.<sup>[41]</sup>

28. On May 5, 2005, Meece submitted another memorandum to the City Council concerning the costs of locating utilities. For this calculation, Meece used, at the suggestion of the City Manager, the average of all wage rates of the gas section employees who did the locating work. This change had the effect of raising the City's cost to \$53,000, as opposed to the lowest bid of \$36,000 by Great Plains Locating.<sup>[42]</sup> Based on this analysis, the City could save about \$18,000 per year by eliminating a position and subcontracting the locating work.

29. On May 9, 2005, the City Council met and considered, among other matters, the issue of contracting services. The council minutes reflect that "a lengthy discussion ensued," in which a former city council representative and public works employees, including the Petitioner, voiced their disagreement with the proposal.<sup>[43]</sup> One of the public works employees had prepared alternate cost figures, which he provided to the City Council. One of the Council members used these alternate cost numbers to revise the calculation done by Meece, but his results continued to show a savings of between \$10,000 and \$15,000. The Council member advised Meece to revise the cost figures to reflect the amount the City would actually save by eliminating a position, as opposed to using an average wage of all gas section employees.<sup>[44]</sup> The Council authorized the Public Works Department to prepare contracts for locating and meter reading for Council review.<sup>[45]</sup>

30. On June 9, 2005, Meece forwarded to the City Council a memorandum containing a revised cost comparison for locating utilities. For the wage component of the City's cost, he used the wage rate of the least senior person, and he revised the transportation expense slightly downward. Assuming the number of locate requests would not increase over current levels, he projected a savings of \$12,000 per year by eliminating a position and subcontracting. The savings would decline to about \$5,000 per year if the number of locate requests increased.<sup>[46]</sup> He also advised the City Council that Otter Tail Power had recently contracted with T & G Meters to do meter reading in Perham.<sup>[47]</sup>

31. The City Council considered the issue again at its meeting on June 13, 2005. The merits of the proposal to subcontract locating and meter reading were thoroughly debated, with Public Works employees advocating that their supervisor's position should be eliminated rather than one of theirs. Based on the cost savings and the increased efficiencies in terms of scheduling and completing tasks without pulling people away to complete the locating work on a timely basis, the Council voted 4-1 to approve the contract with Great Plains Locating. Based on the increased efficiencies and the desire to complete rural meter reading twice a year, the Council voted 4-1 to approve the contract with T & G Meters.<sup>[48]</sup> The City Council's decisions to approve these contracts were made in the good faith belief that these goals were in the City's best interest.<sup>[49]</sup>

32. On July 7, 2005, the contract with T & G Meters became effective.<sup>[50]</sup>

33. In City Council meetings regarding the subcontracting issue, there was never a discussion concerning who would be laid off when and if the position were eliminated.<sup>[51]</sup> In late July or early August, Meece and the City Manager started looking at the question of who would be laid off as a result of eliminating one position in the gas section of Public Works. City personnel policies provide that layoff will be based on qualifications, with the least qualified person laid off first.<sup>[52]</sup> Meece and the City Manager were aware that the union contract, which was not yet in place but was close to being completed, called for layoffs based on seniority. In making their decision they wanted to comply with both city personnel policies and the anticipated union contract.<sup>[53]</sup>

34. Meece and the City Manager selected the Petitioner as the person to be laid off because he was the least senior employee, and he was also the least qualified because other employees were qualified to work in more areas of the Department.<sup>[54]</sup>

35. On August 1, 2005, the contract with Great Plains Locating Service, Inc., became effective.<sup>[55]</sup>

36. On August 17, 2005, the City and the union had their final negotiation session. At the conclusion of this session they had agreed on all the terms of the contract, except for the effective date of the agreement and which provisions would be retroactive.<sup>[56]</sup>

37. On August 17, 2005, the City Manager drafted a letter to the Petitioner, informing him that he would be laid off from his current position effective September 2, 2005. The City manager offered him a part-time or seasonal position. The City Manager did not mail the letter that day, but pinned it to the Petitioner's time slip on August 19, 2005.<sup>[57]</sup>

38. On September 2, 2005, the City Manager hand-delivered to the Petitioner a final notice of layoff. In this notice the City Manager explained that



the City had eliminated one position from the Department, that the Petitioner was the least senior person in the Department, and that all of the other employees except for one were veterans. The letter provided notice of the Petitioner's rights under the Veterans Preference Act.<sup>[58]</sup>

39. The same day, the Petitioner accepted the part-time position. He began working part-time on September 5, 2005.<sup>[59]</sup>

40. Ken Ellingson, who had been the third gas technician in the gas section, was reassigned to the Petitioner's water/wastewater position.<sup>[60]</sup> The gas section now has two gas technicians, Keith Huntley and Gerald Schock. The Department now has six positions total, including the supervisor. It has two part-time employees, Dorvin Wendt and the Petitioner.<sup>[61]</sup> There is no evidence that the number of seasonal employees has increased or that the number of overtime hours worked by the existing employees has increased as a result of eliminating the gas technician position.<sup>[62]</sup>

41. Another cost-cutting measure the City implemented in 2005 was to reduce the utility billing position from full-time to part-time.<sup>[63]</sup>

42. On October 17, 2005, the City notified the Petitioner that he would be laid off from his part-time position effective October 21, 2005, due to reduced work requirements.<sup>[64]</sup>

43. On October 17, 2005, the Petitioner filed a petition with the Department of Veterans Affairs alleging that his layoff was not for incompetence or misconduct but was done in retaliation and without good cause. He stated that in previous weeks he had been involved in a workers compensation claim, taken time off for reasons relating to a disability, actively participated in union negotiations, and been at odds with one or members of management over the reporting of safety issues in the City.<sup>[65]</sup>

44. The collective bargaining agreement negotiated between the City and the Union became effective October 18, 2005.<sup>[66]</sup>

45. On October 25, 2005, the Commissioner of Veterans Affairs issued a Notice and Order for Hearing, scheduling a hearing to take place on December 22, 2005 at the Office of Administrative Hearings.

46. On December 15, 2005, a telephone prehearing conference was held to narrow the issues and to address scheduling and subpoenas. The hearing was continued to February 16-17, 2006.<sup>[67]</sup>

47. A second telephone prehearing conference was held on January 31, 2006. At that time the hearing was scheduled to take place in Perham.<sup>[68]</sup>

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. Under Minn. Stat. §§ 14.50 and 197.481, the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised in this case under the Veterans Preference Act, Minn. Stat. § 197.46.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant procedural requirements of law and rule including providing proper notice of this hearing.

3. The Petitioner is a veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 and is entitled to all of the protections and benefits afforded by the Veterans Preference Act.

4. The City of Perham is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.46, and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 et seq.

5. Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetence or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

6. The prohibition against removal does not apply if the position was eliminated in good faith for a legitimate purpose.<sup>[69]</sup>

7. Whether a Veteran's position has been eliminated in good faith for a legitimate purpose is an affirmative defense for which the public employer has the burden of proof.<sup>[70]</sup>

8. The City of Perham met its burden of proving that it eliminated a position in the Department of Public Works in good faith for a legitimate purpose. The City's identification of the Petitioner as the person who would be laid off as a result of the elimination of this position was made in good faith and did not violate the Veterans Preference Act.

9. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

## RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Veterans Affairs DENY the Petition of Terry V. Davis.

Dated: May 3, 2006

/s/Kathleen D. Sheehy  
KATHLEEN D. SHEEHY  
Administrative Law Judge

Reported: Transcribed (two volumes)

## MEMORANDUM

The Veterans Preference Act protects honorably discharged veterans from arbitrary removal from public employment. Under the Act a veteran can be removed from public employment only for incompetence or misconduct and only after a hearing on those allegations.<sup>[71]</sup> This record does not contain any indication of misconduct or incompetence on the part of the Petitioner. The Act does not, however, completely restrict a public employer's exercise or control over its administrative affairs.<sup>[72]</sup> The Minnesota Supreme Court has interpreted the Act to authorize the abolishment of a position held by a veteran if the public employer acts in good faith for a legitimate purpose.<sup>[73]</sup> If a job is abolished for no good reason other than to get rid of the veteran, the Veteran's Preference Act and all of the rights afforded by it will apply.<sup>[74]</sup> As the Minnesota Supreme Court noted in *State ex rel. Boyd v. Matson*:

The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. [Citations omitted.] The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran's preference act.<sup>[75]</sup>

In determining whether a position has been abolished in good faith, the Minnesota courts have looked at several factors, including: (1) whether the reasons articulated by the employer have a legitimate, factual basis,<sup>[76]</sup> (2) whether the job duties previously performed by the veteran remain to be performed or are being performed by others,<sup>[77]</sup> and (3) whether the substance of the decision to abolish the veteran's position was an objective and reasonable exercise of administrative discretion.<sup>[78]</sup> Whether a public employer abolished a position in good faith is a question of fact.<sup>[79]</sup> The burden is on the employer to establish this affirmative defense by a preponderance of the evidence.<sup>[80]</sup> In determining whether a position has been eliminated in good faith, a reviewing tribunal is obliged to examine the substance of the action and not just the form.<sup>[81]</sup>

The reasons articulated by the City Council have a legitimate, factual basis: cost savings and increased efficiency in completing scheduled tasks within the Department. The City was concerned about costs and had implemented a variety of other cost-cutting measures that affected personnel in and out of the Public Works Department. In addition, a position in the gas section was in fact eliminated; there is one less person working in the Department, and no one has been hired to replace the Petitioner. Finally, the decision was not precipitously or arbitrarily made; the Council took several months to consider the issue, recommended specific revisions to the cost analysis to make it more accurate, and heard lengthy arguments both for and against the proposal. The Council's decision to subcontract this work was objectively reasonable. The implementation of that decision, and the City's identification of the Petitioner as the person to be laid off because he was the least senior and least qualified employee in the Department, was also objectively reasonable.

The Petitioner claimed in his petition that the City did not act in good faith but retaliated against him due to his involvement in a workers compensation claim, because he took time off for reasons relating to a disability, because he actively participated in union negotiations, and because he had been at odds with one or members of management over the reporting of safety issues. There is no credible evidence that the position was eliminated specifically for the purpose of getting rid of the Petitioner for any of these reasons.

With regard to the workers compensation claim, the Petitioner injured his shoulder in August 2004. He had surgery in September 2004, and all work restrictions were eliminated after he recovered. He reinjured his shoulder twice in 2005, and there were lifting restrictions and overhead work restrictions in place during 2005 through the time he was laid off. Because of these restrictions, he worked primarily on mowing and painting throughout the summer and fall of 2005.<sup>[82]</sup> Significantly, however, the Petitioner admitted he had no basis for believing that he was laid off because of his workers compensation claim.<sup>[83]</sup>

The Petitioner also maintained that he had post-traumatic stress disorder (PTSD) as a result of his service in Iraq in 1990-91, although he sought no

treatment for the disorder until October 2004.<sup>[84]</sup> According to the Petitioner, Meece permitted him to take time off for treatment. The Petitioner took the time off. Eventually, the Petitioner admits that his work began piling up and was not being done on a timely basis. When that happened, Meece told him to start using comp time or vacation time for PTSD treatment, which the Petitioner did for two to three months thereafter.<sup>[85]</sup> Assuming that this is all true, there is still no evidence that almost one year later Meece targeted the Petitioner for layoff because of his request for time off for treatment of PTSD in the fall of 2004.

The Petitioner also contended that the City targeted him for layoff because he was actively involved in union negotiations. There is no evidence that the Petitioner was more vocal than other supporters of the union. Other union activists who later became union stewards, Keith Huntley and Gerald Schock, did not lose their jobs. Although the record suggests that the City Manager may have taken some personal satisfaction in the fact that the City's budget had to be tightened at the same time the union was organizing, the evidence is insufficient to conclude that the Petitioner's job was eliminated in retaliation for his support of the union. The City Manager and Public Works supervisor were genuinely interested in exploring this option before they knew that the union was organizing, and the Mayor and City Council members who actually made the decision to subcontract the work and eliminate the position testified uniformly that it was a response to LGA reductions.<sup>[86]</sup> Furthermore, even Bill Parks, a former Council member who opposed the subcontracting, testified that the issue was always presented to the Public Works Committee and the Council strictly as a financial consideration.<sup>[87]</sup>

In addition, the Petitioner contended that his job was eliminated because he had been at odds with one or members of management over the reporting of safety and pollution issues. In July or August 2005, an officer of the Department of Natural Resources and staff members from the Minnesota Pollution Control Agency contacted the City regarding a complaint about the odor in a stormwater runoff pond. At some other time, the City received a complaint about an OSHA violation in connection with the repair of a water or sewer main. Although the record is not clear when this happened, it is clear that no one in the City had any idea that the Petitioner was involved in these complaints until he disclosed his involvement in the course of this proceeding.<sup>[88]</sup>

Finally, the Petitioner maintains that the cost analysis that was the basis for concluding the City could save money by contracting out the locating and meter reading work was flawed and was manipulated to make it appear that the City would realize more savings than are realistic to expect. Essentially, the Petitioner's expert and co-workers in the Department took the position that locating was not a full-time job even during the eight months of the year that an employee was assigned to it full-time, because that employee would also do work other than locating on those days. They maintained that the City should have performed time studies to separate out how much time was actually spent on locating and meter reading versus other duties. They advocated that different

figures be used to calculate the potential savings due to subcontracting. Using different wage rates and hourly figures that excluded vacation, sick, and holiday time, the Petitioner's expert calculated that the City would save only about \$5,000 per year by subcontracting. His opinions are not persuasive because he did not include an allowance for the time required to drive to rural areas to locate utilities, he was not aware of the size of the gas system, he did not know how many locate requests were in town versus rural areas, and he did not know that all locates had to be performed within 48 hours.<sup>[89]</sup> Moreover, the Petitioner's expert admitted that the correct analysis was to examine the cost of the position to be eliminated, regardless of how much time the person in this position spent on locating versus other duties, if this other work was to be absorbed by employees working regular time without additional cost.<sup>[90]</sup>

More important than examining after-the-fact whether the analysis could have been done differently, however, is determining whether there is evidence that the analysis was skewed to achieve a particular result. Here, the record is clear that Meece used a model provided by a vendor to analyze these costs, that the City Council wanted accurate numbers used in the analysis, that the analysis was revised to reflect these concerns, and that the City Council was ultimately satisfied that its decision would save the City money and promote efficiency.

During the hearing, the Petitioner also contended that the City's costs were not truly reduced because it entered into a \$25,000 contract to have sewer jetting services performed after he was laid off. Sewer jetting is one of the water/wastewater responsibilities. City witnesses testified without contradiction that the contract became necessary in the fall of 2005 because Public Works employees determined that the jetting truck (a 1976 model) was on the verge of wearing out and would in fact wear out and be unavailable for emergencies if it were used for routine maintenance.<sup>[91]</sup> The City has since purchased new equipment, and a City employee is scheduled to perform the service without a subcontract.<sup>[92]</sup> This evidence is insufficient to support the Petitioner's argument that the Council lacked good faith in eliminating his position.

The Petitioner also maintained during the hearing that his advocacy on behalf of an employee who he believed was being sexually harassed by other Public Works employees made him a target for layoff. There is evidence that the Petitioner reported the situation to Meece, and that Meece spoke to the employee and asked whether she wanted to make a complaint, which she did not wish to do. He warned the alleged offenders verbally. Nonetheless, the Petitioner repeatedly raised this issue with Meece in front of others, frequently raising his voice and yelling at Meece to explain what he was going to do about it.<sup>[93]</sup> Meece did not respond by yelling back, he simply told the Petitioner that he was handling the situation. Merle Meece is a quiet, reserved person who clearly would be uncomfortable with this type of conflict; however, he maintained that he held no personal animosity toward the Petitioner, and there is no evidence, even from the Petitioner or other employees, to suggest that the Petitioner's abrasive



conduct, rather than his seniority or his qualifications, was the basis for the decision to lay him off.

Based upon a consideration of the entire record in this matter, the Administrative Law Judge concludes that the City has met its burden of proving that it acted in good faith when it eliminated a position from the Public Works Department and consequently laid off the Petitioner from his full-time position.

K.D.S.

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<sup>[1]</sup> Tr. 450-53; Ex. 64.

<sup>[2]</sup> Tr. 55-56.

<sup>[3]</sup> Tr. 50, 149.

<sup>[4]</sup> Exs. 2, 3A, 3B, 3C, 3D; Tr. 25-33, 229-37.

<sup>[5]</sup> *Id.*

<sup>[6]</sup> Tr. 25-35; 229-37, 322.

<sup>[7]</sup> Tr. 118.

<sup>[8]</sup> Tr. 19-20.

<sup>[9]</sup> Tr. 46-47; 53-55.

<sup>[10]</sup> Tr. 43-56, 247-48, 417 (City once was cited for not completing survey items on a timely basis).

<sup>[11]</sup> Tr. 450-53; Exs. 1-2.

<sup>[12]</sup> Ex. 2.

<sup>[13]</sup> Tr. 52-54; 60-62, 420-21.

<sup>[14]</sup> Tr. 214.

<sup>[15]</sup> Tr. 64.

<sup>[16]</sup> Tr. 56-57.

<sup>[17]</sup> Tr. 57, 248.

<sup>[18]</sup> Tr. 57, 71, 365.

<sup>[19]</sup> Tr. 70.

<sup>[20]</sup> Tr. 493.

<sup>[21]</sup> Tr. 198, 337.

<sup>[22]</sup> Tr. 456.

<sup>[23]</sup> Tr. 494.

<sup>[24]</sup> Tr. 66.

<sup>[25]</sup> Tr. 128.

<sup>[26]</sup> Ex. 54 at 13.

<sup>[27]</sup> Tr. 367.

<sup>[28]</sup> Tr. 248-50.

<sup>[29]</sup> Ex. 16; Tr. 263.

<sup>[30]</sup> Ex. 26.

<sup>[31]</sup> Ex. 4.

<sup>[32]</sup> Ex. 27.

<sup>[33]</sup> Tr. 104-06.

<sup>[34]</sup> Ex. 4. It cannot not be determined from the memorandum itself how much money the City would actually save, because the contract bids were not complete and it is hard to compare the price terms with the City's cost; however, Meece concluded the savings would be sufficient to eliminate one full-time position and part-time positions.

<sup>[35]</sup> Ex. 5.

<sup>[36]</sup> Ex. 6.

<sup>[37]</sup> Ex. 7.

<sup>[38]</sup> Ex. 8.

<sup>[39]</sup> Ex. 28.

[40] Ex. 10.  
[41] Tr. 106-115.  
[42] Ex. 12.  
[43] Ex. 14.  
[44] Tr. 280, 372-77.  
[45] Ex. 14.  
[46] Ex. 18.  
[47] Ex. 19.  
[48] Ex. 20; Tr.  
[49] Tr. 214-15; 378. The Petitioner suggested during the hearing that the Public Works Department lacked authority to eliminate a position unless the City Council passed a resolution specifically authorizing a reduction in staff. The City's personnel manual simply provides that the City Council must authorize in advance any reduction in staff, and does not require a specific resolution. See Ex. 53. The Council understood that by approving the subcontracts, it was approving the elimination of one full-time position. See Tr. 380-81.  
[50] Ex. 22.  
[51] Tr. 100, 214, 371, 377.  
[52] Ex. 53.  
[53] Tr. 116-120.  
[54] Tr. 118-20.  
[55] Ex. 21.  
[56] Tr. 101, 174, 176-77; Ex. 23.  
[57] Exs. 30, 32.  
[58] Ex. 31.  
[59] Ex. 32; Tr. 124. Part-time employee Brenda Anderson had resigned in the summer of 2005, and the City offered Davis her position. Tr. 122.  
[60] Tr. 196.  
[61] Tr. 125, 228-37.  
[62] As noted above, Meece factored into his cost analysis 20 hours of overtime per year for the position that was eliminated. Keith Huntley testified that he had a "record" level of 30 hours of overtime this year, see Tr. 423, but there is no evidence linking this 10-hour increase in overtime to the elimination of a gas technician position, as opposed to other possible reasons. Even if there were such evidence, a 10-hour increase in overtime alone would not be persuasive evidence that the position was eliminated in bad faith.  
[63] Tr. 67.  
[64] Ex. 33.  
[65] Petition for Relief under the Veterans Preference Act, October 17, 2005.  
[66] Ex. 54.  
[67] First Prehearing Order, December 16, 2005.  
[68] Second Prehearing Order, January 31, 2006.  
[69] *State ex. rel. Boyd v. Matson*, 193 N.W.2d 30 (Minn. 1923); *Young v. City of Duluth*, 386 N.W. 2d 732, 737 (Minn. 1986).  
[70] *Caffrey v. Metropolitan Airports Commission*, 246 N.W. 2d 637, 641 (Minn. 1976).  
[71] Minn. Stat. § 197.46.  
[72] *State ex. rel. Boyd v. Matson*, 193 N.W.2d 30 (Minn. 1923).  
[73] *Gorecki v. Ramsey County*, 437 N.W. 2d 646, 650 (Minn. 1989).  
[74] *Young v. City of Duluth*, 386 N.W. 2d at 737.  
[75] 155 Minn. 137, 193 N.W. 30, 32 (Minn. 1923).  
[76] *Caffrey*, 46 N.W. 2d at 641.  
[77] *Young*, 386 N.W. 2d at 738-739.  
[78] *Gorecki*, 437 N.W. 2d at 650.  
[79] *State ex. rel. Niemi v. Thomas*, 223 Minn. 435, 438, 27 N.W. 2d 155, 157 (1947).  
[80] *Caffrey*, 246 N.W. 2d at 641.  
[81] *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987).  
[82] Tr. 478-82.  
[83] Tr. 486-87.

<sup>[84]</sup> Tr. 452-53, 469.

<sup>[85]</sup> Tr. 469-70. Meece testified that he did not recall the Petitioner ever asking for or taking any time off work for PTSD treatment. See Tr. 354-55.

<sup>[86]</sup> Tr. 214, 365.

<sup>[87]</sup> Tr. 500.

<sup>[88]</sup> Tr. Tr. 190-92, 352-53, 488.

<sup>[89]</sup> Tr. 533-36.

<sup>[90]</sup> Tr. 539, 545. See also Tr. at 384 (City Council knew that the labor savings would come from reducing the number of positions by one, not specifically from reducing the hours spent locating).

<sup>[91]</sup> Tr. 132, 551.

<sup>[92]</sup> Tr. 552.

<sup>[93]</sup> Tr. 192-93; 196-97, 299-300, 350-51, 426-31.